No. 88-1128 (3)

Supreme Court, U.S.
FILED
FEB 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ANTONE FOLKINS, ET AL.,

Respondents.

On Writ Of Certiorari To The California Supreme Court

AMICI CURIAE BRIEF OF STATES OF ALASKA, COLORADO, KANSAS, MONTANA, NEVADA, NORTH DAKOTA, OKLAHOMA, AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the reserved rights doctrine, which holds that the United States impliedly reserves water rights for use on federal lands, should be expanded to authorize the reservation of Indian commercial fishing rights in a navigable river that belongs to all the people of California.

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INTEREST OF AMICI CURIAE

This amici brief is filed under Rule 36.4 of the Rules of the Supreme Court, which authorizes states to file amici briefs as of right with respect to matters in which they have an interest. The amici states have substantial amounts of federal reserved lands within their borders, and also have navigable waterways flowing within their borders that serve important state interests. Therefore, the amici states have a strong interest in questions concerning the scope of the reserved rights doctrine, which holds that the United States impliedly reserves water rights for use on federal reserved lands.

The California Supreme Court expanded the reserved rights doctrine beyond limits recognized by this Court. The Court held that the doctrine authorizes the reservation not only of water rights, but also of other kinds of rights – in this case, Indian commercial fishing rights in a navigable river that California has traditionally regulated and managed. In the view of the amici states, the reserved rights doctrine applies in the water rights context only, and does not authorize reservations of rights other than water rights. The doctrine's purpose is to allow the United States to acquire water rights with priority over competing water rights that arise under state law after the date of the reservation. Neither authority nor logic supports the view that the doctrine should be expanded to authorize reservations of other kinds of rights.

By expanding the reserved rights doctrine here, the California Supreme Court has substantially diminished state sovereign trust authority over navigable waters. The states' trust authority, as relevant here, authorizes state regulation of fish resources in navigable waters for the benefit of the whole community. In this case, the California Supreme Court abrogated the states' trust authority

over their fish resources, holding that Indians on a reservation created during the post-statehood period have the *exclusive* right to commercially harvest a fish resource that migrates through navigable waters. It is doubtful if the states can properly exercise their trust authority if, as the California Supreme Court held, the states are unable to prevent the commercial exploitation of fish resources in navigable waters. Therefore, the states request that this Court grant the petition and reverse the decision below.

SUMMARY OF ARGUMENT

The reserved rights doctrine authorizes the United States to reserve water rights for use on federal reserved lands. The doctrine is a water rights doctrine only, and does not authorize the reservation of other kinds of rights. The California Supreme Court improperly expanded the reserved rights doctrine by holding that an executive order creating an Indian reservation during the post-statehood period impliedly "reserved" an exclusive right for the Indians to commercially fish in the river. The Court failed to consider whether federal, state and tribal interests warrant an expansion of the reserved rights doctrine to the commercial fishing context. Indeed, the Court did not even consider whether commercial fishing is a "primary" or "secondary" reservation purpose, as required by this Court's recent decision in *United States v. New Mexico*, 438 U.S. 696 (1978). The decision below conflicts with this Court's decisions restricting the reserved rights doctrine to the water rights context.

By expanding the reserved rights doctrine, the California Supreme Court has improperly limited the states' sovereign dominion and control of fish resources in navigable waters, as such dominion arises under the equal footing doctrine. This Court has consistently held that the

states have sovereign dominion over fish resources in navigable waters, and therefore that the United States cannot convey proprietary rights in such resources during the post-statehood period. The decision below circumvents this limitation by holding that the United States impliedly "reserved" commercial fishing rights, in the sense that the United States "reserved" water rights in *Arizona v. California*, 373 U.S. 546 (1963). In effect, the California Supreme Court decision allows the United States to improperly "grant" proprietary rights by "reserving" them.

The ultimate question under the reserved rights doctrine is whether Congress "intended" to reserve water rights. The executive order creating the Indian reservation here specifically excluded the river from the reservation in recognition of California's sovereign dominion over its fish resource. Therefore, the "intent" of the executive order clearly was to preserve California's sovereign interests, rather than "reserve" exclusive Indian commercial fishing rights.

ARGUMENT

I. CONTRARY TO THE DECISION BELOW, THE RESERVED RIGHTS DOCTRINE IS A WATER RIGHTS DOCTRINE ONLY, AND DOES NOT AUTHORIZE RESERVATION OF FISHING RIGHTS.

A. The Reserved Rights Doctrine

Under the reserved rights doctrine, the United States has the right to reserve, and impliedly reserves, unappropriated water for use on federal reserved lands. *Cappaert v. United States*, 426 U.S. 128, 138-139 (1976); *United States v. New Mexico, supra*, 438 U.S. at 698; *Arizona v. California, supra*, 373 U.S. at 597-601; *Winters v. United States*, 207 U.S. 564 (1908). The California Supreme Court, relying on this Court's decision in *Arizona v. California*,

supra, held that the reserved rights doctrine authorizes Indians on a reservation adjacent to a navigable river to commercially fish free of restrictions imposed by state law. App. 5-6. The Court's decision represents an unprecedented and unwarranted expansion of the reserved rights doctrine, and conflicts with this Court's decisions restricting the scope of the doctrine.

This Court has consistently held that the reserved rights doctrine is a water rights doctrine only. In *Cappaert v. United States, supra,* this Court stated that:

> "This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a *reserved right in unappropriated water* which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of *water rights* is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing *water rights* in navigable and nonnavigable streams. . . . *Arizona v. California,* 373 U.S. 546, 601 (1963); [other citations omitted]." 426 U.S. at 138 (emphasis added).

In *United States v. New Mexico, supra,* this Court stated that:

> "This Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, . . . Congress did not intend thereby to relinquish its authority to reserve *unappropriated*

> *water* in the future for *use* on appurtenant *lands* withdrawn from the public domain for specific federal purposes." 438 U.S. at 698 (emphasis added).

In *Arizona v. California, supra,* the case on which the California Supreme Court relied, this Court stated that:

> "We have no doubt about the power of the United States under these clauses [the Commerce Clause and Property Clause] to reserve *water rights* for its reservation and its property." 373 U.S. at 598 (emphasis added).

Thus, *Cappaert, New Mexico* and *Arizona* explicitly hold that the reserved rights doctrine authorizes reservations only of "water rights." As this Court stated in *New Mexico,* the doctrine authorizes reservations only of "unappropriated water" for "use" on appurtenant reserved "lands." The purpose of the doctrine, according to these decisions, is to authorize the United States to acquire water rights under federal law for use on reserved lands, with a priority based on the date of the reservation. The doctrine has never been construed as authorizing reservations of other kinds of rights, and its logic and policy do not support such an expansion.

The California Supreme Court below reasoned that, because the United States impliedly reserves water rights for use on reserved lands, it necessarily reserves commercial fishing rights as well. Contrary to this assumption, this Court has carefully restricted the scope of the reserved rights doctrine in order to avoid undue interference with state sovereign interests under the equal footing doctrine. In *United States v. New Mexico, supra,* this Court held that the United States impliedly reserves water rights only for "primary" reservation purposes, and that the United States must acquire water rights for "secondary" reservation purposes under state law. Thus, this Court in *New Mexico* qualitatively considered federal

and state interests – in terms of whether federal "primary" or "secondary" interests are involved – in order to limit federal intrusion on state sovereign interests. In light of *New Mexico*, the reserved rights doctrine cannot be applied, much less expanded, without determining whether discrete federal interests outweigh state sovereign interests under the equal footing doctrine. The California Supreme Court utterly failed to make such an inquiry. Indeed, since the Solicitor of the Department of the Interior in 1940 concluded that California law applies to Indian fishing in the Klamath River, Pet. 10, and since the Secretary of the Interior in 1974 adopted regulations *prohibiting* Indian commercial fishing in the Klamath River, Pet. 3 n. 2, it is difficult to conclude that any conceivable federal interest supports the reservation of Indian commercial fishing rights in this case.

Under this Court's decision in *New Mexico*, the threshhold inquiry in determining whether the reserved rights doctrine applies to a particular federal or tribal activity is whether the activity constitutes a "primary" or "secondary" reservation purpose. The California Supreme Court, applying *Arizona v. California* by analogy and ignoring *New Mexico* altogether, failed to consider whether *commercial* fishing is a "primary" or "secondary" reservation purpose. In other words, even assuming that the reserved rights doctrine should be expanded to the fishing context, the question remains whether *commercial* fishing is a primary or secondary reservation purpose. The California Supreme Court, in uncritically expanding the doctrine here, completely failed to make this essential inquiry.

The historic purpose of the reserved rights doctrine, as applied to Indian reservations, was to allow Indians to acquire water rights for development of *land* and thus encourage their assimilation into the mainstream of

American civilization.[1] In *Arizona v. California, supra,* this Court held that the reserved rights doctrine, as applied to Indian reservations, authorizes the reservation of water only for *"irrigation"* uses, and that the reserved right is measured by the "practicably *irrigable* acreage" of the reservation. 373 U.S. at 597-598, 600 (emphasis added). Similarly, the General Allotment Act of 1887, 24 Stat. 388, which established federal reservation policy for nearly a half century – and which provided for the issuance of Indian trust allotments for agricultural and grazing purposes – established "a policy of assimilating the Indians through . . . the compulsory individualization of Indian *lands;*" Congress thus undertook "to prepare the Indians to take their place as independent, qualified members of the modern body politic." *Board of Commissioners v. Seber,* 318 U.S. 705, 716 (1943) (emphasis added); see *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 369 (1968). Thus, Congress' historic reservation policy, as interpreted by this Court, has been to encourage the development of Indian land. This policy is not consistent with reservations of commercial rights in fish resources that belong to all the people.

B. The Equal Footing Doctrine

As noted above, this Court has restricted the scope of the reserved rights doctrine in order to limit federal intrusion into areas traditionally regulated by the states

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[1] In *Winters v. United States, supra,* where the reserved rights doctrine was initially applied to Indian reservations, this Court stated that the Indians' "lands were arid, and, without irrigation, were practically valueless;" it cannot be imagined, the Court stated, that Congress meant to leave the Indians with a "barren waste – took from them the means of continuing their old habits, yet did not leave them the power to change to new ones." 207 U.S. at 576, 577.

under the equal footing or public trust doctrine.[2] Under the equal footing doctrine, each state acquires dominion and sovereignty over its navigable waters – including fish resources in the waters – at the time of its admission to the Union. *Martin v. Waddell,* 41 U.S. 367, 410 (1841); *Shively v. Bowlby,* 152 U.S. 1, 14-15, 26, 48 (1894); *Hardin v. Jordan,* 140 U.S. 370, 381 ((1891); *Illinois Central R.R. Co. v. Illinois,* 146 U.S. 387, 435-437 (1892); *United States v. Oregon,* 295 U.S. 1, 14 (1935); *United States v. Texas,* 339 U.S. 707, 717 (1950). In *Martin v. Waddell, supra,* this Court stated that:

> "For when the revolution took place, the people of each state themselves became sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." 41 U.S. at 410.

In *Illinois Central,* this Court explained the nature of the states' sovereign interests more fully, stating that:

> "[T]he State holds the title to the lands under the navigable waters . . . in the same manner that the State holds title to soils under tide water, by the common law, . . . But it is a title different in character from that which the State holds in lands intended for sale. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the

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[2] This Court has traditionally used the "equal footing" nomenclature in describing the source of the states' sovereign interests in navigable waters. See, *e.g., Pollard's Lessee v. Hagan,* 44 U.S. 212, 223 (1845). In *Phillips Petroleum Co. v. Mississippi,* ___U.S. ___, 108 S.Ct. 791 (1988), this Court used the "public trust" nomenclature for this purpose, apparently because the former applies only to newly-admitted states and the latter applies to the original thirteen states as well.

> waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." 146 U.S. at 452.

This Court has explicitly held that the states' sovereign dominion and sovereignty over navigable waters extends to fish resources in the waters, and that the states hold their fish resources in trust for the public. *McCready v. Virginia*, 94 U.S. 391, 394-395 (1876); *Manchester v. Massachusetts*, 139 U.S. 240, 259-262 (1891); *Shively v. Bowlby, supra*, 152 U.S. at 11; *Hardin v. Jordan, supra*, 140 U.S. at 381. In *McCready*, this Court stated that:

> "The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. [Citations omitted.] *In like manner, the States own the tide-waters themselves, and the fish in them,* so long as they are capable of ownership while running. . . . The title thus held is subject to the paramount right of navigation, the regulation of which . . . has been granted to the United States. *There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State,* which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. . . . The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship." 94 U.S. at 395 (emphasis added).

In the same vein, this Court stated in *Hardin* that:

> "With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which

> they are situated . . . Such title to the shore and lands under water is regarded as incidental to the sovereignty of the State – a portion of the royalties belonging thereto and *held in trust for the public purposes of navigation and fishery* – and cannot be retained or granted out to individuals by the United States." 140 U.S. at 381 (emphasis added).

To be sure, the states cannot regulate their fish resources in a discriminatory manner. *Hughes v. Oklahoma*, 441 U.S. 322 (1980); *Toomer v. Witsell*, 334 U.S. 385 (1948). California's regulation in this case, however, applies equally to everyone, both Indians and non-Indians.

This Court has imposed a significant limitation on state sovereign interests under the equal footing doctrine. This Court has held that the United States, as the absolute owner of navigable waters and fish resources during the pre-statehood period, has the right to convey proprietary rights in the waters and resources during that period. *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1926); *Montana v. United States*, 450 U.S. 544, 551-552 (1981); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). This Court, however, has narrowly construed such conveyances in order to protect the states' sovereign interests, stating that:

> " 'Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. [Citation omitted.] For that reason, upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate or foreign commerce.' "

United States v. Texas, supra, 339 U.S. at 717, quoting from *United States v. Oregon, supra,* 295 U.S. at 14.

In this case, the United States did not convey Indian fishing rights prior to California's admission to statehood. California was admitted to the Union in 1850. 9 Stat. 452. The Indian reservation was not created until 1891. 1 Kappler, *Indian Affairs: Laws and Treaties* 815 (emphasis added). Therefore, the Indian reservation was created *after* California's admission to the Union. Accordingly, the United States could not have granted Indian fishing rights in this case during the post-statehood period, even assuming *arguendo* that the executive order creating the reservation can be construed as conveying such rights. The California Supreme Court improperly construed a post-statehood executive order as *reserving* Indian fishing rights, although such rights could not have been directly *granted* during the post-statehood period. In the view of the amici states, the United States cannot indirectly accomplish under its reserved rights authority what cannot be directly accomplished under its authority to grant proprietary rights in navigable waters.

The United States itself has expressed the view that the Indians on the reservation in this case do not have "reserved" fishing rights and thus cannot fish in violation of California law. According to an opinion of the Solicitor of the Department of the Interior, issued in 1940, the State of California has the right to regulate Indian fishing in the Klamath River if the river was navigable at the time of California's admission to the Union. I Ops. Solicitor, U.S. Dept. of Interior, 1917-1974, at 945-948 (March 13, 1940); Pet. 14. In effect, the Solicitor followed this Court's decision in *McCready v. Virginia* by holding that California has the sovereign right to regulate the very fish resource involved in this case, and that the United States has not "reserved" – and cannot reserve – exclusive fishing rights for the Indians. The California Supreme Court

reached the contrary result without considering or even mentioning the Solicitor's opinion.[3]

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[3] The petition for writ of certiorari notes that the Secretary of the Interior adopted regulations in 1977 that, according to the California Supreme Court's earlier decision in *People v. McCovey*, 36 Cal.3d 517 (1984), preempt California laws applicable to Indian commercial fishing in the Klamath River. Pet. 3 n. 2. The petition properly notes, however, that the Secretary would lack authority to adopt regulations that preempt California law if the Indians do not have "reserved" fishing rights, since in that event California would have the sovereign right to regulate the fish resource under the equal footing doctrine. Pet. 3 n. 2, 6-7 n. 5. That is, if California has sovereign title to the resource under the equal footing doctrine, and if the Indians do not have "reserved" fishing rights that limit California's sovereign title, the Secretary cannot unilaterally abridge California's sovereign title by adopting preemptive regulations. The California Supreme Court did not appear to conclude otherwise.

In the view of the amici states, the Secretary's regulations should be construed in light of the Solicitor's 1940 opinion, which, as noted above, declared that California has sovereign title to the fish resource and therefore that the Indians do not have "reserved" fishing rights. So construed, it is unlikely that the Secretary's regulations were intended to preempt California laws. That is, if the Solicitor concluded in 1940 that California has the sovereign right to regulate Indian fishing in the Klamath River, the Secretary's 1974 regulations logically cannot be construed as preempting California law. This conclusion is buttressed by the fact that the Secretary's 1974 regulations are harmonious with California law, in that the regulations – similarly to California law – *prohibited* Indian commercial fishing at the time of the actionable conduct in this case.

II. THE EXECUTIVE ORDER CREATING THE INDIAN RESERVATION REAFFIRMS THAT CALIFORNIA HAS THE RIGHT TO REGULATE INDIAN COMMERCIAL FISHING AND THEREFORE THAT THE INDIANS DO NOT HAVE "RESERVED" FISHING RIGHTS.

This Court has consistently emphasized that the reserved rights doctrine is based on congressional *intent*. According to this Court:

> "In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the government *intended to reserve unappropriated and thus available water*. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created. [Citations omitted.]" *Cappaert v. United States, supra,* 426 U.S. at 139 (emphasis added).

Therefore, if Congress intends that state law be followed, reserved rights cannot be inferred. The ultimate question is one of congressional intent.

The executive order creating the Indian reservation in this case, viewed in light of its language and surrounding historical circumstances, plainly evinces an "intent" *not* to reserve Indian fishing rights. The executive order specifically provided that the reservation includes only a "tract of country . . . one mile in width *on each side* of the Klamath River." 1 Kappler, *Indian Affairs: Laws and Treaties* 815 (emphasis added). This limitation was inserted because the United States Attorney General, in a written opinion, stated that California had sovereign dominion and control over the Klamath River, and that the Secretary of the Interior – who proposed to create the reservation – could not include the river itself in the reservation. The Attorney General opinion stated that:

> "In the case of McCready v. Virginia (94 U.S., 391, 394) the Supreme Court says: . . . 'In like manner the States own the tide-waters themselves and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. (Martin v. Waddell, 16 Pet., 410) The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tidewaters and their beds, to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation.' " S. Exec. Doc. No. 140, at 13-14, 50th Cong., 2d Sess. (1887); Pet. 20.

Thus, the executive order, read in light of the Attorney General opinion, plainly excluded the Klamath River from the Indian reservation in recognition of California's sovereign interests in the river. The "intent" of the executive order was to allow California to exercise its sovereign trust over the resource, not to "reserve" Indian fishing rights that are beyond the reach of California law.

Significantly, the executive order relied on this Court's decision in *McCready v. Virginia*, which holds that the State has "exclusive control" of fish resources in navigable waters. As noted earlier, the Interior Solicitor also relied on this Court's decision in *McCready* in concluding that California has the sovereign right to regulate Indian fishing in the Klamath River. In other words, this Court in *McCready* held that states have the sovereign right to regulate fish resources in navigable waters; the President in 1891 relied on *McCready* in issuing the executive order that preserved California's sovereign interests

in the Klamath River fish resource; and the Interior Solicitor in 1940 relied on *McCready* in holding that California has the right to regulate Indian fishing in the river. The California Supreme Court decision not only flies in the face of this Court's decision in *McCready*, but also disregards the President's intent in creating the reservation and the Solicitor's opinion in construing Indian fishing rights in this case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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